



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

September 29, 2003

Ms. Angela M. DeLuca
Assistant City Attorney
City of College Station
P.O. Box 9960
College Station, Texas 77842

OR2003-6838

Dear Ms. DeLuca:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 189065.

The College Station Police Department (the "department") received a request for electronic communications (e-mails) sent or received from mobile computer-equipped patrol units during a specified time interval. You state that you have withheld some responsive information from disclosure pursuant to a previous determination that our office granted all governmental bodies in Open Records Decision No. 670 (2001) (certain personal information of peace officers under section 552.117(2)), and pursuant to a previous determination that our office granted to College Station in Open Records Letter No. 2001-5847 (2001) (Texas license plate numbers under section 552.130). You claim that the remaining responsive information is excepted from disclosure under sections 552.101, 552.103, and 552.108 of the Government Code. We have considered the exceptions you claim and have reviewed the information you submitted.

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception encompasses information that other statutes make confidential. The department claims that the requested information is confidential under article 39.14 of the Code of Criminal Procedure. The department argues that under article 39.14, "the requested information is not available to criminal defense counsel except in cases where good cause and materiality is shown under the discovery provisions." We conclude, however, that article 39.14 does not make the requested information confidential. *See* Open Records Decision Nos. 658 at 4 (1998) (statutory confidentiality must be express, and confidentiality requirement will not be implied from statutory structure), 478 at 2 (1987) (statutory confidentiality requires express language making certain information confidential or stating that information shall not be released to the public). Therefore, the requested information

is not excepted from disclosure under section 552.101 of the Government Code in conjunction with article 39.14 of the Code of Criminal Procedure.

The department also appears to contend that the requested information is confidential under Rules 612 and 615 of the Texas Rules of Evidence. In raising Rules 612 and 615, the department cites *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001), which concluded that the Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' that makes information expressly confidential for purposes of section 552.022 of the Government Code. We note, however, that section 552.022 of the Government Code is not applicable to the requested information. In any case, Rules 612 and 615 of the Texas Rules of Evidence are not confidentiality provisions. See ORD 658 at 4, 478 at 2. Therefore, the department may not withhold the requested information under Texas Rule of Evidence 612 or 615.

The department also raises section 552.103 of the Government Code. This exception provides in part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate: (1) that litigation was pending or reasonably anticipated on the date of its receipt of the request for information *and* (2) that the information at issue is related to that litigation. See *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); see also Open Records Decision No. 551 at 4 (1990). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *Id.*

The department represents to this office that the requested information relates to the arrests of two individuals who are the subject of pending criminal prosecutions. We understand you to assert that these criminal cases were pending when the department received this request

for information. The department does not inform us, however, that it is a party to the pending criminal litigation. *See* Gov't Code § 552.103(a); Open Records Decision No. 575 at 2 (1990). Under such circumstances, we require an affirmative representation from the prosecuting attorney representing the governmental body that is a party to the litigation that he or she wants the submitted information withheld from disclosure under section 552.103. The department has submitted two letters from an Assistant County Attorney for Brazos County in which the Assistant County Attorney states that his office is prosecuting the pending cases. In both letters the prosecutor states that "[t]he information being requested relates to our pending criminal litigation because it includes records related to the arrest of this individual for the alleged offense." The letters ask that the requested information be withheld from disclosure to protect the prosecutor's position in the pending criminal prosecutions. We find that the department has established that criminal litigation was pending when it received this request for information. We find, however, that you have not demonstrated that any of the submitted information relates to the arrests and thus to the pending criminal litigation. *See* Open Records Decision Nos. 551 at 5 (1990) (attorney general will determine whether governmental body has reasonably established that information at issue is related to litigation), 511 at 2 (1988) (information "relates" to litigation under predecessor to section 552.103 if its release would impair governmental body's litigation interests). Therefore, none of the submitted information may be withheld pursuant to section 552.103.

Next, we address the department's claims under section 552.108 with regard to the requested information. Section 552.108(a)(1) excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]" A governmental body that raises section 552.108 must reasonably explain how and why section 552.108 is applicable to the information. *See* Gov't Code § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986). The department contends that the requested communications constitute information that "relates to the pending litigation because it is used at trial to determine the credibility of [the arresting officers], [their] competency to testify, and [their] qualification as . . . expert witness[es]." The department also claims that the requested information, which relates to the time interval during which the arrests occurred, could be used to create a defense. Both the department and the prosecutor contend that the release of the information would interfere with the prosecution of the pending cases. However, neither the department nor the prosecutor has demonstrated that the release of any of these communications would interfere with the detection, investigation, or prosecution of crime. *See* Gov't Code § 552.108(a)(1); *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177, 186-87 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases); ORD 434 at 3 (law enforcement agency must explain how release of particular records or parts thereof would interfere with law enforcement or prosecution). We therefore conclude that none of the information is excepted from disclosure under section 552.108(a)(1).

The department also raises section 552.108(b)(1), which excepts from disclosure “[a]n internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution . . . if . . . release of the internal record or notation would interfere with law enforcement or prosecution.” This office has concluded that section 552.108(b) excepts from public disclosure certain information relating to the security or operation of a law enforcement agency. *See, e.g.*, Open Records Decision Nos. 531 (1989) (release of detailed use of force guidelines would unduly interfere with law enforcement), 456 (1987) (release of forms containing information regarding location of off-duty police officers in advance would unduly interfere with law enforcement), 413 (1984) (release of sketch showing security measures to be used at next execution would unduly interfere with law enforcement), 409 (1984) (if information regarding certain burglaries exhibit pattern that reveals investigative techniques, information is excepted under law enforcement exception), 341 (1982) (release of certain information from Department of Public Safety would unduly interfere with law enforcement because release would hamper departmental efforts to detect forgeries of drivers’ licenses), 252 (1980) (law enforcement exception is designed to protect investigative techniques and procedures used in law enforcement), 143 (1976) (disclosure of specific operations or specialized equipment directly related to investigation or detection of crime may be excepted). To claim this exception, however, a governmental body must meet its burden of explaining how and why the release of the requested information would interfere with law enforcement and crime prevention. Open Records Decision No. 562 at 10 (1990). Furthermore, generally known policies and techniques may not be withheld under section 552.108. *See, e.g.*, Open Records Decision Nos. 531 at 2-3 (1989) (Penal Code provisions, common law rules, and constitutional limitations on use of force are not protected under section 552.108), 252 at 3 (1980) (governmental body did not meet burden because it did not indicate why investigative procedures and techniques requested were any different from those commonly known). Having considered your arguments, we conclude that the department has not shown that the release of any of the information would interfere with law enforcement, crime prevention, or the security and operation of a law enforcement agency. *See* Gov’t Code § 552.108(b)(1); Open Records Decision No. 508 at 4 (1988) (governmental body must demonstrate how release of particular information at issue would interfere with law enforcement efforts). Therefore, the department may not withhold any of the information under section 552.108(b)(1). Because none of your claimed exceptions apply, the department must release the submitted information in its entirety.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full

benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, reading "Karen Hattaway". The signature is fluid and cursive, with the first name "Karen" and last name "Hattaway" clearly distinguishable.

Karen Hattaway
Assistant Attorney General
Open Records Division

KEH/sdk

Ref: ID# 189065

Enc: Submitted documents

c: Mr. Jim W. James
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(w/o enclosures)